IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

NO. 78-328

Joe Henry Chambers ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Petitioner, Joe Henry Chambers, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 29, 1978, and the Order of the United States Court of Appeals for the Eighth Circuit denying Petition for rehearing and Petition for Rehearing En Banc entered on July 28, 1978.

OPINION BELOW

The opinion of the Court of Appeals in this cause has not yet appeared in the official Federal Reports, but a copy thereof is appended hereto as Appendix B. The Order entered denying Petition for Rehearing and Rehearing En Banc has not appeared in the official reports but a copy is Appended hereto as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked because of various prejudicial errors in denying requests of the Petitioner and admitting prejudicial evidence over his objections. The judgment sought to be reviewed was entered on June 29, 1978. The Petition for Rehearing was denied on July 28, 1978, a copy of the order denying same being appended hereto as Appendix C. Title 28 USCA 1254(1) confers upon this Court the jurisdiction to review the judgment in question by Writ of Certiorari.

QUESTIONS PRESENTED

I. The admission of the written statement of codefendant Griffin, with primarily name references to the other defendants excised only, violated petitioner's right to cross-examination secured him by the confrontation clause of the Sixth Amendment.

II. The written statements (excised as to primarily name only) of all three of the defendants, were

acts of concealment of the conspiracy alleged in Count I and as such should not have been introduced on Count I of the indictment.

III. The written statements of Griffin and Hansel were inadmissible hearsay as to the conspiracy count under the law of conspiracy of this court and the "in furtherance of" requirement of Rule 801 (d) (2) (e) of the Federal Rules of Evidence.

IV. The failure of the trial court upon timely request to give a cautionary instruction at the time of introduction of the written statements of petitioner and codefendants Griffin and Hansel. As to the limited effect of statements of co-conspirators.

V. The introduction of the written statement of informant Boggess and his testimony thereon was irrelevant and prejudicial.

VI. Count III of the indictment neither alleges an essential element of a charge of a violation of §1006, nor the manner or means by which the criminal offense was to have been committed and is constitutionally defective.

VII. Admission of proof of four alleged same or similar transactions was in error and in violation of Federal Rules of Evidence 403 and 404 (b) as properly applied.

VIII. A directed verdict of acquittal should have been directed for petitioner Chambers on Count V — the §1014 violation, since the Government's proof lacked the essential element of scienter and the evidence was insufficient to show any connection of petitioner with the act alleged in Count V.

IX. "Intent to defraud" as defined by the District Court in its closing instructions to the jury improperly defined the "intent" element of the offense a §1006 violation.

X. The proffered minutes of the Lonoke Production Credit Association were admissible and the trial court should have granted a continuance to Chambers to investigate the circumstances surrounding the minutes.

STATEMENT OF THE CASE

Petitioner Joe Henry Chambers was jointly indicted and tried with co-defendants Griffin and Hansel on a five count indictment which alleged substantive violations of §1006 for each defendant, substantive violations of §1014 and 2 for each defendant and a conspiracy violation 371. Appendix A. Chambers was found guilty on Count I, the conspiracy count, and Count III, the substantive charge against Chambers only of §1006; but not guilty of Count V, the substantive charge of 2 and §1014. Griffin and Hansel were found guilty on Count I, Count II the substantive charge of §1006 against Griffin only, Count IV the substantive charge of §1006 against Hansel only, and Count V the §1014 substantive charge.

Petitioner Chambers was sentenced to serve a concurrent jail sentence of 15 months on each of Count I and Count III and to pay a fine of $5,000.00 on Count I and a fine of $2,500.00 on Count III. Petitioner Appealed to the Eighth Circuit Court of Appeals; his conviction was affirmed on June 29, 1978, (Appendix B). His petition for rehearing was denied on July 28, 1978, (Appendix C). Months before and again during the trial, petitioner Chambers moved dismiss Count III of his indictment; for evidence favorable to the defense, and for a bill of particulars and Petitioner Chambers also requested a severance; all of which were denied by the Court.

During opening statements the government attorney referred to of the defendants written statements (opening statements T. 23-30).

The defense of petitioner Chambers is that he was a licensed realtor at the time of the indictment transaction and was not prohibited from buying and selling property, thus no criminal intent was presented to support his conviction on any count.

During the trial, over petitioners objection, pursuant to Rules 403 and 404 of the Federal Rules of Evidence, the government introduced evidence of two two-part transactions all four parts of which were supposed to be separate violations.

The proof of these two two-part transactions as developed, disclosed that all of the essential physical characteristics of the indictment transaction were not present in the extraneous offense transactions, that one part of each of the two two-part transactions occurred several years prior to the indictment transaction and at a time when the regulations governing the actions of the three co-defendants were different than those at the time of the indictment transaction. More importantly to the extreme prejudice of petitioner the demonstrative nature of this proof was overwhelming.

The essential physical characteristics in the indictment case are the forced purchase of a particular farm after an advancement of P.C.A. loan proceeds after approval of the loan application containing a false

statement reference purpose (Govt. Exh. 7, 8, & 9, T. 113) from a trustee-attorney (Vii, T. 25, 120) (Viii, T.40, 48, 80) (Viv, T. 69) by the defendants (Viii, T. 80) (Viv, T. 69) and the receipt of monies by the defendants for same. (Viv, T. 189).

Four same or similar transactions, proof consisting of the two-part transaction of Weber-Bearden and Boothe of 28 exhibits with large demonstrative charts accompanied by handouts and six witnesses and of the Max Lasley transaction consisting of 22 exhibits with two demonstrative charts, accompanying handouts and four witnesses, were introduced. 50 exhibits with accompanying witnesses and charts, out of a total number of Government exhibits of 115, were used by the Government, as was the final two days of their case, to prove these acts that were limited to Counts I and V of the indictment. In addition, different regulations of the P.C.A. were in effect for part of the Max Lasley transaction, which occurred in 1972, and for the initial part of the Weber-Bearden transaction, which occurred in 1972. The regulations in effect at the time of the indictment were not promulgated until the latter part of 1973. (Vii, T. 13, 17). No bad intent can be inferred from a transaction which was not against the regulations at the time it occurred—not outside the bounds of defendant's profession.

During the governments case the written statements Appendix D of the three defendants, Joe Henry Chambers (Vv, T. 170, Gov. Ex. 66) dated July

23, 1976, Charles Griffin (Vv, T. 181, Gov. Ex. 68) dated July 22, 1976, Bill Hansel (Vv, T. 159, Gov. Ex. 64) dated July 22, 1976, and informant Jimmy Boggess (Vvi, T. 58, Gov. Ex. 69) Appendix E were introduced by the Government into evidence for the truth of the matter asserted. Primarily the names of each of the co-defendants had been excised from each of the other defendant's statements at the time introduced, but all of the statements were similar in substance and language and were incriminatory of all defendants, for informant Boggess, after being granted immunity, later testified for the Government that his statement was false in its particulars and that the defendants had told him what to say; and co-defendant, Bill Hansel testified that his statement was also false. Moreover, prior to testimony in the case the U.S. Attorney had read in opening statements, without objection of counsel, each defendant's statement including the name references to all four persons each defendant's statement (opening statement, T. 23, T. 25-27, T. 27-30). Chambers' attorney had not read or referred to any of the defendant's statements in opening statement. Neither Chambers nor Griffin took the witness stand.

No limiting instruction of any kind was given by the Court at the time of the introduction of either petitioner Chambers or co-defendant Griffin's written statement, even though the Court recognized that at the least the statements should be limited to the defendant whose statement it was. Neither was there a limiting instruction given to the effect of the written statement of defendant Hansel as to upon which count the evidence

was admissible: the conspiracy count (Count I) or the substantive Counts, II, III, IV, V, even though such instruction was specifically requested by Chambers.

After discovery by the petitioner of relevant minutes of the Lonoke Production Credit Association, Appendix F, on the sixth day of trial the District Court refused to grant a continuance so that the defendants could investigate the circumstances surrounding the minutes. The court also refused to introduce the minutes or to allow cross-examination with reference to the minutes.

Petitioner Chambers was not granted a verdict of acquittal by the court on Count V—the §1014 charge. The proof was that the meaning of the term allegedly false "crop loan" was ambiguous and by the defendants' usage of the term there could be no false statement violation since the important element of scienter was not present. The defendants' usage of the term is supported in the record by the testimony of several farmers in that area who testified when they say "crop loan" in their application, they can use the money for anything they wish, but that their crop is pledged as security for the loan. Odus Chapman (Vix, T. 132); Walter Tinkle (Vix, T. 134); Donald Chapman (Vix, T. 137); Jim Malone (Vix, T. 140); Darrell Saul (Vix, T. 154) L.W. Morris (Vix, T. 157); A. S. Kelley (Vix, T. 165); and Leroy Isbell (Vix, T. 173) Thus the term was accurately used in the loan application in question.

Chambers asserted also that he was neither an aider and abettor nor a principal to the act alleged in Count V. The record supports his assertion.

Finally over the objection of Petitioner Chambers the District Court submitted its own definition of the term "intent to defraud" to the jury in closing instruction. By doing so, the court intended to define the term in light of §1006; but we submit in doing so the Court impermissibly broadened the scope of §1006 and permitted a conviction thereunder for an act not intended to be criminal by the legislature of the United States.

REASONS FOR GRANTING THE WRIT

I.

The admission of the written statement of co-defendant Griffin, with primarily name references to the other defendants excised only, violated petitioner's right to cross-examination secured him by the confrontation clause of the Sixth Amendment.

1. A substantial question of the continued viability of this Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968) is raised by this decision of the Eighth Circuit Court of Appeals.

In *Bruton, supra*, this Court, relying upon the confrontation clause of the Sixth Amendment, held that a conviction of a defendant in a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence.

Bruton, as its predecessor *Delli Paoli v. United States*, 389 U.S. 818 (1957) later overruled by *Bruton*, presupposed that at the very least a limiting instruction of the effect of the statement of the codefendant should be given by the court to limit the effect of the statement. See *Clune v. United States*, 159 U.S. 590, 593 (1895); *Fiswick v. United States*, 329 U.S. 211 (1946); *Krulewitch v. United States*, 336 U.S. 440 (1949). In this case *no* instruction was given at the time codefendant Griffin's written statement was introduced.

A fortiori petitioner's constitutional rights were violated.

Respectfully, the written statement of Griffin unexplained was incriminating to defendant Chambers even though references to the other defendants by name were excised at the time the statements were introduced. The written statements of all three defendants and informant Boggess were similar in language and import. Boggess testified that his statement was false and that the defendants told him what to say. Hansel testified also that his (Hansel's) statement was false. We note both Hansel and Boggess had been represented by the same attorney until one week before. (Vv, T. 200, 201) The clear implication is that unless Griffin explains the true circumstances concerning his statement, the jury will believe that his statement is also false, and that if Griffin's statement is false, then so is Chambers'. Yet codefendant Griffin is not available to testify for Chambers and to be cross-examined by Chambers.

Furthermore, the Government has read to the jury each one of the three written statements (with name references not excised) of the defendants, including *in each* statement the many references to the other two codefendants and the informant Boggess Appendix F.

Moreover the District Court instructed the jury in closing instructions on exculpatory statements proved false. Clearly the instruction increased the effect of

Griffin's incriminatory statement on Chambers. The jury recalls and an unwarranted conviction results, based upon unconstitutional hearsay—the statement of Griffin.

The principles of *Bruton* apply to this case (presupposed by the opinion of the Eight Circuit Court of Appeals), not that of *Dutton v. Evans*, 400 U.S. 74 (1970). If the statement complained about is hearsay, then *Bruton* applies; if not, then *Dutton* applies. Here the Government introduced the statements for all purposes (Vv, T. 152) (Vv, T. 133). The Government never disclosed to the court that the statements were introduced for a limited purpose, and the statements were *never* limited as to purpose.

Even were the *Dutton* rule to apply, there is still reversible error for the statement of Griffin was crucial and devastating to Chambers. *Anderson v. United States*, 417 U.S. 211 (1974) authored by Mr. Justice Marshall; *United States v. Kelley*, 551 F.2d 760 (8th Cir. 1977).

Only that the Assistant U. S. Attorney read the statements into evidence in the opening statement was discussed by the Court of Appeals. That error was *not* the primary thrust of Chambers' appeal, and for that reason alone this court should grant this petition.

2. The Eight Circuit Court of Appeals in the case at bar is in direct conflict with regard to this issue of the continued validity of *Bruton, supra.*

In *United States v. DiRodio*, 565 F.2d 573 (9th Cir. 1977) the court held in a similar case that the introduction of such a statement in a joint trial is a violation of a defendant's constitutional right of cross-examination.

II.

The written statements (excised as to primarily name only) of all three of the defendants, (Appendix D, and the unexcised statement of informant Boggess, Appendix E,) were acts of concealment of the conspiracy alleged in Count I and as such should not have been introduced on Count I of the indictment.

An extremely important question of the continued validity of this Court's decision in *Grunewald v. United States*, 353 U.S. 391 (1957) is raised by this decision of the Court of Appeals.

The written statements of all three codefendants and the informant Jimmy Boggess were exculpatory on their face. They became incriminatory only after the informant Boggess and codefendant Hansel testified that the statements were false. See Point I, *supra*. These exculpatory statements were at the worst an attempt to conceal the conspiracy count of the indictment transaction at a time when the conspiracy had ended. Upon timely objection they should not have been admissible on the conspiracy count or, at the very least, the effect of the statements should have been

limited to the substantive violations of §1006. *Grunewald, supra* which was not done.

Grunewald held that acts of cover-up of a conspiracy are inadmissible to prove the conspiracy violation. The acts of cover-up in *Grunewald* included statements of the defendant and his codefendant. Respectfully, the continued validity of *Grunewald* has been questioned in the Eight Circuit; that question should be answered.

III.

The written statements of Griffin and Hansel were inadmissible hearsay as to the conspiracy count under the law of conspiracy of this court and the "in furtherance of" requirement of Rule 801 (d) (2) (e) of the Federal Rules of Evidence.

1. A substantial issue is raised as to the continued validity of this court's decisions in *Krulewitch v. United States*, 336 U.S. 440 (1949) and *Lutwak v. United States*, 344 U.S. 604 (1953).

The statement of Griffin is inadmissible hearsay insofar as petitioner Chambers is concerned, since the statements were made after the alleged conspiracy had ended. Though the trial court recognized that the statement of a defendant was inadmissible against other defendants, he *did not* so instruct the jury as to Griffin's statement; even though the error was brought to the court's attention and an instruction was requested. The

only instruction given with reference to the statement of the alleged conspirators, Griffin and Hansel, was that at the close of the Government's case which made no reference to any defendant by name and was given some twelve days later on July 5, 1977 (Vxi, T. 20).

Krulewitch, supra, and *Lutwak, supra,* held that statements made by coconspirators after the alleged conspiracy has ended are inadmissible hearsay against any one other than the individual defendant who made the statement.

2. The continued viability of the requirement of such statements being "in furtherance of" the conspiracy before admissibility arising from Rule 801 (d) (2) (e) is raised in the case at bar.

Prior to this decision the Eighth Circuit had consistently held that the "in furtherance of" requirement arises from Rule 801 (d) (2) (e) and is to be applied in the proper case. *United States v. Harris,* 546 F.2d 234, (8th Cir. 1977); *United States v. Jackson,* 549 F.2d 517, 534 (8th Cir. 1977).

In the case at bar the District Court stated that the statements were made long after the conspiracy had ended. Clearly they were not "in furtherance of" the conspiracy.

3. The decision in the case at bar is in direct conflict with the Ninth Circuit Court of Appeals.

In *Di Rodio, supra,* the error of the introduction of testimony about the out-of-court statements of a codefendant coconspirator not made in furtherance of a conspiracy or during the pendency of the conspiracy could not be cured by a limiting instruction. Again, at the least, a limiting instruction is pre-supposed. In the case at bar there was not even a limiting instruction from the court at the time the statements were introduced. This court should reconcile the decisions of these two circuits.

IV.

The failure of the trial court upon timely request to give a cautionary instruction at the time of introduction of the written statements of petitioner and codefendants Griffin and Hansel as to the limited effect of the statements of co-conspirators.

This court should resolve this important question so that the conflicts between the circuits with reference to this issue can be resolved.

The Fifth Circuit has held that the introduction of such a statement without limitation results in reversible error under certain circumstances. *United States v. Apollo,* 476 F.2d 156 (5th Cir. 1973). The First Circuit did so hold at one time, *U.S. v. Honneus,* 508 F.2d 566 (1st Cir. 1974), though at the present time it does not. *United States v. Petrozzrillo,* 548 F.2d 20 (1st Cir. 1977). Even the Eighth Circuit has in other cases specifically reserved for the appropriate time this important

question of limiting instructions. See Note 4, *United States v.Kelley*, 526 F.2d 615 (8th Cir. 1975). See Judge Gibson, Note 4, *United States v. Graham*, 548 F.2d 1302 (8th Cir. 1977). See Circuit Judge Henley, Note 8, *United States v. Smith*, 564 F.2d 244 (8th Cir. 1977). However, on April 19, 1978, in *United States v. Bell*, No. 77-1894 (April 19, 1978), Appendix G, the Eighth Circuit held that from henceforth the question of the existence of a conspiracy is for the court alone, unless the existence is not later supported by the evidence, in which event the court should declare a mistrial unless a cautionary instruction would cure the prejudice. *Bell* apparently is in direct conflict with *Apollo, supra*, and *Honneus, supra*, as is the case at bar.

In the case at bar the District Court had determined the conspiracy was *not* in existence at the time the statements were made; yet the court still introduced the statements (contrary to *Bell, supra*). At that time the petitioner requested a timely limiting instruction to which he would have been entitled at the time under *Apollo, supra*, or a mistrial in any event under *Bell* if *Bell* were retroactively applied. The court made a mistake, in any event, and reversible error was the result. The only instruction given with reference to the statement of the alleged conspirator Griffin was that at the close of the case which made no reference to any defendant by name and was given some twelve days later on July 6, 1977.

V.

The introduction of the written statement of informant Boggess and his testimony thereon was irrelevant and prejudicial.

This court should review this error of law in conjunction with Question I, supra, petitioner's constitutional right of cross-examination. Jimmy Boggess was not a defendant in the case. He was not indicted as a coconspirator in the case. He was not even an unindicted coconspirator in the case, as the proof discloses; and his statement was given years after any alleged conspiracy had ended.

The written statement of Boggess Appendix E and his testimony in reference of same is inadmissible on Count III as being impeachment on a collateral issue.

That Boggess has lied to the Government investigators is not relevant to Count III. The only purpose possible for this testimony of Boggess was to demonstrate: (1) Boggess' statement is similar to the defendant's statements; (2) Boggess is a liar; (3) the defendants told Boggess to lie; (4) that the defendants are liars. Clearly this is not a proper purpose, Rule 404 (a) Federal Rules of Evidence.

VI.

Count III of the indictment neither alleges an essential element of a charge of a violation of §1006, nor

the manner or means by which the criminal offense was to have been committed and is constitutionally defective.

1. A substantial question of law is raised by the direct conflict between the decision in this case and this court's previous decisions, culminating in *Hamling v. United States*, 418 U.S. 87 (1974). Mr. Justice Rehnquist stated the law succinctly in *Hamling:*

> "Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hagner v. U.S.*, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932); *U.S. v. Debrow*, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92 (1953). It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' *U.S. v. Carll*, 105 U.S. 611, 612, 26 L.Ed. 1135 (1881). Undoubtedly the language of the statute may be used in the general description of the offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. *U.S. v. Hess*, 124 U.S. 483, 487, 88 S.Ct. 571, 573, 31 L.Ed. 516 (1888)."

Prior to this time even the Eighth Circuit Court of Appeals had applied the first requirement of *Hamling, supra. U.S. v. Brown*, 540 F.2d 364 (8th Cir. 1976),

authored by Circuit Judge Webster. *Brown, surpa*, held that all essential elements of the offense must be alleged, and the indictment there also established a time frame, identified the victims, the property extorted, the *methods of extortion*, and the nature of the commerce affected.

Count III of Petitioners indictment reads as follows:

> "Count III: I. The grand Jury realleges the allegations contained in Paragraph I of Count I.
>
> II. That on or about the 26th day of July, 1974, in the Eastern District of Arkansas, JOE HENRY CHAMBERS, being Vice President of the Lonoke Production Credit Asso. a federally chartered body corporate and instrumentality of the U.S. of America under the supervision of the Federal Intermediate Credit Bank (FICB) of St. Louis, MO, and the Farm Credit Adm. with intent to defraud said association did participate, share in and directly and indirectly receive monies, profits and benefits, that is the sum of $20,000.00 by means of and through the disbursement by the said Ass. of its Check NO. 60491, and Maudie Huntsman, dated the 24th of July, 1974, and purportedly representing proceeds of crop loan to Harold V. Huntsman and Maudie Huntsman, thereby violating the provisions of Title 18, U.S. Code, Section 1006."

Appendix A

An essential element of a §1006 Violation is not alleged: "(2) That the defendant participated, shared in or received either directly or indirectly, money, profit or benefit *by and through any transaction of such institution.*" *United States v. Hykel*, 461 F.2d 721 (3rd Cir. 1972) emphasis added.

Most certainly, the manner or means by which the offense is alleged to have been committed is not alleged; rather the indictment only tracks the language of the statute. That the indictment mentions what Chambers was to have received and the transaction involved without more does not cure these constitutional defects, as the Court of Appeals states.

Both manner and means and the essential element "by and through any transaction" are also important from the standpoint of double jeopardy and notice. A §1006 violation is an offense against an association with which a defendant is supposed to have a fiduciary relationship, which offense occurred in this "fiduciary" capacity. A manner, means or method was not detailed by which the crime was committed. The "conflict of interest" for which Chambers is being punished is not specified. Without alleging facts supporting a conflict of interest, and all essential elements of the offense no criminal act is alleged. Only by detailing the manner and means and alleging the essential elements can a defendant establish and protect his double jeopardy rights.

After reading Count III it is apparent that an act of violation of 18 USC §657 is alleged; not one in violation of 18 USC §1014. Without manner or means and without the above essential element of a charge of §1014, petitioner was charged as an agent or employee of a lending institution who embezzled, abstracted, perceived or willfully misapplied something of value belonging to such institution. A decision in the Seventh Circuit has specifically held that such an indictment should be reversed. *United States v. Quinn*, 365 F.2d 256 (7th Cir. 1966).

The earliest Supreme Court decision on this subject is *United States v. Mills*, 7 Pet. 138, 8 L.Ed. 636 (1833 U.S.), where without explicit reference to the Sixth Amendment, the court held:

> "The offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged."

The first constitutionally-oriented decision was *United States v. Cruikshank*, 92 U.S. (1875).

We respectfully submit that the Fifth Amendment to the United States Constitution as construed by the court demands that the defendant in the case at bar be tried *only* on the indictment of the Grand Jury. *Ex Parte Bain*, 121 U.S. 1; *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Camp*, 541 F.2d 737 (8th Cir. 1971).

2. The decision of the Eighth Circuit Court of Appeals is inconsistent with the position of the Seventh Circuit involving indictments for violations of §1006.

Two §1006 Counts of a four count indictment were held to be defective in *U.S. v. Quinn*, 365 F.2d 256 (7th Cir. 1966). There the defendant was convicted of two §657 and two §1006 violations. Held "through a transaction of such an institution" is an essential allegation of a §1006 violation. In another §1006 count the manner or means of committing the offense was not alleged. Result: Two counts reversed.

The decision of the 8th Circuit in the case at bar should be reviewed by this Court to resolve the conflict between the circuits and to protect the petitioners rights.

VII.

Admission of proof of four alleged, same or similar transactions was in error and in violation of Federal Rules of Evidence 403 and 404(b) as properly applied.

1. The various circuit courts of appeal apply varying standards in their individual application of the Federal Rules of Evidence 403 and 404(b). Some circuits have held the adoption of the Federal Rules of Evidence did not represent a new rule of decision. Other circuits have recognized that the new Federal Rules of Evidence 403 and 404(b) did not change the pre-existing case law.

The Eighth Circuit Court of Appeals has held the Federal Rules of Evidence 403 and 404(b) have substantially changed the pre-existing law and; this holding was applied in the case at bar. This court should resolve this issue so that the rule of law applied in all circuits is uniform.

The fifth Circuit Court of Appeals in *United States v. Beechum*, 555 F.2d 487 (5th Cir. 1977) specifically held that the rule of law, that the essential physical elements of the indictment case must be present in the "other act" evidence before admissibility, established in *United States v. Broadway*, 477 F.2d 991 (5th Cir. 1973) and its progeny* was not changed by the adoption of the Federal Rules of Evidence 403 and 404(b). We note the Fifth Circuit is presently reviewing the Beechum decision on petition for rehearing.

The Third Circuit has observed recently that "Rule 404(b) was in accord with the rulings of this circuit." *United States v. Goichman*, 547 F.2d 778 (3rd Cir. 1976) Goichman cited with approval a statement from a treatise that "Rule 404(b) merely codifies prior federal doctrine concerning evidence of past bad acts." Id at. 782.

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*See *United States v. Rice*, 550 F.2d 1364, 1372 (5th Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3020 (July 26, 1977); *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977); *United States v. Taglione*, 546 F.2d 194 (5th Cir. 1977); *United States v. Adderly*, 529 F.2d 1178 (5th Cir., 1976); *United States v. Kirk*, 528 F.2d 1057 (5th Cir. 1976); *United States v. Urdiales*, 523 F.2d 1245 (5th Cir. 1975), cert. denied, 426 U.S. 920 (1976). See also *United States v. Bloom*, 528 F.2d 704 (5th Cir. 1976).

The Sixth Circuit in *United States v. Ailstock*, 546 F.2d 1285 (6th Cir. 1976) emphasized the similarity requirement in admitting evidence of other crimes. The court deemed it "a prerequisite" to the admissibility that "prior criminal acts referred to in the testimony be similar to those actually charged in the indictment." Id. at 1289. In so holding, the Sixth Circuit cited Rule 404(b) as well as cases both antedating and postdating the effective date of the rule.

The Ninth Circuit in *United States v. Rocha*, 553 F.2d 651 (9th Cir. 1977) stated that Rule 404(b) "codifies prior case law", the court cited cases both antedating and postdating the effective date of the federal rules.

In a slightly earlier Ninth Circuit decision, *United States v. Brashier*, 548 F.2d 1315 (9th Cir. 1976), affirming the trial court's judgment convicting the defendant, the Ninth Circuit held that evidence of similar concurrent investments was admissible to establish intent in the transactions giving rise to his prosecution. Again, the Ninth Circuit cited Rule 404(b) as well as cases antedating and postdating the effective date of the rule. The court established a tripartite test for determining the admissibility of evidence of prior acts. To be admissible, the court held that (1) such evidence must be "similar and close enough in time to be relevant", (2) the prior act must be established by "clear and convincing evidence, and (3) the probative value of such evidence must outweight its potential prejudice. Id. at 1325.

Opinions in other circuits at the time of the enactment of the Rules contain no indication of a change in the law effected by the enactment of Rule 404(b). See also *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976); *United States v. Fairchild*, 526 F.2d 185 (7th Cir. 1975), cert. denied, 425 U.S. 942 (1976). To the contrary the opinions indicate the Rule merely represents a codification of pre-existing law.

To confuse the issue even more, the commentators have given no indication that Rule 404(b) has changed the law. See J. Wigmore, *Wigmore on Evidence* 6c (3rd. Ed. 1977 Supp.); C. Wright, Federal Practice and Procedure 410 (1969 & 1977 Supp.); Report of American College of Trial Lawyers Committee to Study the Proposed Rules of Evidence IV(3) 1970; is Gard, Jones on Evidence 4.15 (1972, 1977 Supp.)

In conflict with the above Circuits the Eighth Circuit has held that a different rule of law is to be applied since the adoption of the Federal Rules of Evidence 403 and 404(b) — Under Rule 403, relevant evidence of other crimes is "excluded if its probative value is *substantially* out weighed by the danger of unfair prejudice..." Emphasis added. Before the enactment relevant evidence was excluded if "its probative value is substantially outweighed by the danger of unfair prejudice..." Moreover under the new rules "the trial judge may exclude (other crimes evidence) only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of

time." 5 Rep. No. 1277, 93d Cong., 2d Sess. 25 (1974); reprinted in (1974) U.S. Code Cong. & Ad. News. pp. 7051, 7071. See Note 2, *United States v. Maestas* for a history of the development of the law in the Eighth Circuit. Surely the prior case law with reference to the act's similarity in nature and the act's being closely related in time to those encompassed in the charge have not been completely erased by one fatal swoop of Congress. *Von Feldt v. United States*, 407 F.2d 95 (8th Cir. 1969); *Koolish v. United States*, 340 F.2d 513 (8th Cir. 1965); *Moses v. United States*, 297 F.2d 621 (8th Cir. 1961); *King v. United States*, 144 F.2d 729 (8th Cir. 1944); *Harper v. United States*, 143 F.2d 795 (8th Cir. 1944); *Brickey v. United States*, 123 F.2d 341 (8th Cir. 1941); *Patterson v. United States*, 361 F.2d 632 (8th Cir. 1966). This circuit is the only circuit which has so held to the knowledge of the petitioner.

2. Another important issue raised is: If the Federal Rules of Evidence 403 and 404 (b) do not constitute a new rule of decision, then whether and which standard applied in the various circuits prior to the adoption of the rules should be adopted by this court for uniform application? We respectfully submit that the standard evolved by case law in the Fifth Circuit should be so adopted by this court. In the Fifth Circuit a substantial body of law has developed requiring proof of "the essential physical elements of the offense charged with these elements being clearly proven by competent evidence". *United States v. Broadway*, Supra and its progeny, supra.

Broadway and its progeny were designed specifically to assess the probative value of the other crimes evidence against its prejudicial effect. This long line of Fifth Circuit cases provides a structured and principled framework for making these decisions. As noted in *Weinstein's Evidence:*

> "Yet some aid to fairness is afforded by analyzing each proffer of other crime proof to determine what evidential hypothesis the jury is expected to use, in weighing the probative force of the line of proof against the need of the prosecutor and the risk specified in Rule 403. The more reason there is to admit or exclude the more apt it is to be fair. Both bench and bar benefit at trial if critical questions of admissibility are exposed and the reasons clearly stated."

2. J. Weinstein and M. Berger, supra, ¶404(08).

Broadway and its progeny fill the need noted in the above quote. This long line of cases should not be discarded. Respectfully the conflict between the various circuits reference Pre-Federal Evidence Rules 403 and 404(b) standards should be resolved.

3. The present standard applied in the Eighth Circuit was not met by the Government.

In *United States v. Maestas*, 554 F.2d 834 (8th Cir. 1977) the continued viability since the enactment of the federal rules of the principles of *U. S. v. Clemons*, 503 F.2d 486, 491 (8th Cir. 1974) (authored by Circuit Judge Lay) was recognized. See *Maestas, supra*, Note 4. The possibility that a defendant might be convicted for a

crime not charged in the indictment on the basis of guilt by association concerned Judge Lay in *Clemons*. Of extreme concern there was that considerable time at the trial had been devoted to serving up the particular incident, with extensive questioning of two witnesses and the introduction of five photographs — prejudicing the defendant.

Recently, Circuit Judge Bright recognized and presumably applied the very principles of *Clemons*, *supra*. *U.S. v. Jones*, No. 77-1490, Feb. 16, 1978 (8th Cir. F.2 1978) Appendix H. Judge Bright presumably reasoned not only that there was prejudice in the amount of time and evidence required during the trial to develop the evidence of other criminal activity, overshadowing the principal case and confusing the jury, but that the evidence (in that case, prescriptions) constituted crimes or unlawful acts if they were only issued outside the bounds of professional medical practice. The burden of proof is on the Government to prove that the standard at the time of the commission of the other acts is similar, if not the same, as the standard at the time of the commission of the principal act, and the "other acts" were outside the bounds of the profession of the defendant. In the case at bar we note that the regulations in effect at the time of the alleged offense were *not* in effect at the time of at least two transactions introduced as same or similar acts.

Neither *Clemons*, supra, nor *Jones*, supra, was applied in this case; but there could not be a clearer case to which their application applies. Four same or similar

transactions, proof consisting of the two-part transaction of Weber-Bearden and Boothe of 28 exhibits with large demonstrative charts accompanied by handouts and six witnesses and of the Max Lasley transaction consisting of 22 exhibits with two demonstrative charts, accompanying handouts and four witnesses, were introduced. 50 exhibits with accompanying witnesses and charts, out of a total number of Government exhibits of 115, were used by the Government, as were the final two days of their case, to prove these acts that were limited to Counts I and V of the indictment. In addition, different regulations of the PCA were in effect for part of the Max Lasley transaction, which occurred in 1972, and for the initial part of the Weber-Bearden transaction, which occurred in 1972. The regulations in effect at the time of the indictment were not promulgated until the latter part of 1973 (Vii, T. 13, 17). No bad intent can be inferred from a transaction which was not against the regulations at the time it occurred—not outside the bounds of defendant's profession.

In addition the Government, by 28 exhibits with five large charts, handouts and 15 witnesses, attempted to prove the repurchase of 2,880 acres of the land by the defendants on Count III by limitation. We assert that no instruction of the court could have had that limiting effect. This evidence clearly confused the jury with reference to that which they could consider on which count. The same test (Rule 403) is to be applied here.

It is no answer that the trial court held three hearings on the admissibility of these transactions. The

demonstrative nature of the presentation of the evidence and the time taken to present that evidence was not revealed to the court or the defendant until proof was introduced. The District Court could not have applied the federal rules accurately.

VIII.

A directed verdict of acquittal should have been directed for petitioner Chambers on Count V — the §1014 violation, since the Government's proof lacked the essential element of scienter and the evidence was insufficient to show any connection of petitioner with the act alleged in Count V.

1. A conviction of a violation of §1014 should not be sustained in the absence of proof of mens rea. This Honorable Court has long recognized that the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo American criminal jurisprudence. *Dennis v. United States*, 341 U.S. 494 (1951), *American Communications Association v. Donds*, 339 U.S. 382, 411, (1950); *Smith v. People*, 361 U.S. 147 (1959); *Hamling v. United States*, 418 U.S. 87 (1974).

The Eighth Circuit Court of Appeals in *United States v. Steinhilber*, 484 F.2d 386 (8th Cir. 1973), a false statement case, heeded the wise words of Mr. Justice Blackmun while a member of the Eighth Circuit Court of Appeals that "carelessness or lack of wisdom is not equivalent to (a) knowledge of falsity..." *Jacobs v. United States*, 359 F.2d 960, 966 (8th Cir. 1966). There

Justice Blackmun held the Government's burden was not met and reversed the conviction since the meaning of the words in question was ambiguous and since the Government had the burden of negating the claim that the defendant "did not know the falsity of his statement at the time it was made or that it was the product of an accident, honest inadvertence, or duress," citing *Bryson v. United States*, 396 U.S. 64, 69-70, (1969).

In *United States v. Jones*, 545 F.2d 1112 (8th Cir. 1974) the Court relying on *Steinhilber supra* again overturned a conviction based on the absence of this important element knowingly.

The overwhelming proof in this case is that the term "crop loan" is not only ambiguous but the use of the term "crop loan" was not false or knowingly given. Testimony from the following farmers demonstrates that the use of "crop loan" was not false: Odus Chapman (Vix, T. 32), Walter Tinkle (Vix, T. 134), Donald Chapman (Vix, T. 137), Jim Malone (Vix, T. 140), Darrell Saul (Vix, T. 154), L.W. Morris (Vix, T. 157), A.S. Kelly, (Vix, T. 165) and Leroy Isbell (Vix, T. 173).

It is no matter that the petitioner was acquitted of this charge by the jury; the district court had a duty to direct a verdict of acquittal, and had it done so, the petitioner would not have been found guilty of any charges.

2. The decision of the Court of Appeals on the sufficiency of the evidence to submit the case to the jury is in direct conflict with the decisions of other circuits.

It is well-established in other circuits, as in the Eighth Circuit, that there must exist some affirmative participation which at least encourages the perpetration to support a conviction of aiding and abetting. *United States v. Crowdog*, 532 F.2d 1182 (8th Cir. 1976); *United States v. Thomas*, 469 F.2d 145 (9th Cir. 1972). That principle has been applied in a §2 and a §1014 case in *United States v. Kramer*, 500 F.2d 1185 (10th Cir. 1974), where the evidence to sustain a §2 violation was held to be insufficient.

The opinion of the Original Panel of the Eighth Circuit Court of Appeals stated the facts in the light most favorable to the Government (No. 77-1597 and 77-1601 at page 3, 8th Cir. 1978) Appendix B. The three references to Chambers do not support a conviction as an aider or abettor on Count V. In fact there is no competent evidence in the record to connect Chambers with the act alleged in Count V.

IX.

"Intent to defraud" as defined by the District Court in its closing instructions to the jury improperly defined the "intent" element of the offense a §1006 violation.

The Courts instruction if this case is not reversed, will become the standard "intent to defraud" instructions in every circuit in the United States in a §1006 case, and the courts instruction permits conflicts for acts not intended by a change of a violation of 18 USC §1006.

The Court instructed the jury as follows: (Vxi, T. 23)

> "You will note that one of the essential elements of the crime charged in Counts II, III and IV of the indictment is that the act of participating in, sharing in, or receiving moneys, profits or benefits through an act of the association be done 'with the intent to defraud the association.'
>
> 'Intent to defraud the association' means the intent to deceive or cheat the association or to deprive the association of some money, profit, property or benefit it is entitled to by virtue of its employment relationship with the defendant or by virtue of any transaction, loan, commission, contract or other act of the association.
>
> In this connection, the evidence need not show that the association suffered any financial loss or that it was actually defrauded; but only that the accused acted with the intent to defraud the association.
>
> An officer or an employee of the association has a duty not to knowingly serve interests which are adverse to those of the association. Such an officer or an employee has a duty to disclose to the association all material information that he has concerning transactions between the association

and its borrowers, including the obligation to disclose any personal or private interests that he might have in, or as a consequence of, such loan transactions.

By accepting employment with the association, an individual becomes obligated to perform his duties in accordance with those bylaws and governmental regulations which are in effect and which are known to him.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made or done by the defendant and all other facts and circumstances in evidence which indicate his state of mind.

In this regard I instruct you also that a defendant's compliance with or his failure to comply with the applicable regulations and by laws of the Lonoke Production Credit Association which were known to said defendant may be considered along with all the other evidence in determining the defendant's intent. As I have said, it is entirely up to you to decide whether to consider such evidence and if so, the weight and effect to give it."

Look at the following defects in this instruction in only this case. First, there was no evidence that the association had lost any money, profit or property, yet the court instructed on it. Secondly, the term benefit is vague and undefinable. What is a benefit? Black's Law Dictionary Rev'd 4th Edition defines benefit generally as

follows: "Advantage; profit; fruit; privilege...a pecuniary advantage or profit; gain; account; interest; the whole benefit and entire beneficial interest..." Compare these definitions with the balance of the instruction; that is, paragraph 3, wherein the instruction states that the evidence need not show that the association suffered a financial loss or was actually defrauded; rather only that the accused acted with the intent to defraud the association. Is a benefit a monetary loss or is it mere negligence or maladministration? If the latter, is that the law? Surely not. Yet on that evidence and under this instruction the jury could convict a defendant on mere negligence or maladministration.

Look at paragraph 4 and compare that paragraph with the regulations in force at the time at the Lonoke Production Credit Association. Government's Exhibit 11, Section g and h. Appendix K. The regulations only require that if there is a question about a transaction an employee should report to his immediate superior. There is no obligation to disclose all material information as the instruction would indicate. Note the conflict between paragraph 4 and paragraph 5. Paragraph 5 stating that an individual becomes obligated to perform his duties in accordance with those regulations which are in effect. The two paragraphs are in hopeless conflict. Similar conflicts would be present for any defendant in a §1006 case.

Defendant Chambers' Requested Instruction No. 23 was refused.

"To act with 'intent to defraud' means to act willfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.

However, the evidence in the case need not establish that the United States or any person was actually defrauded, but only that the accused acted with the 'intent to defraud'.

An act is done 'willfully' if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law."

This instruction avoids the problems inherent in the Court's instruction. There is no chance that the defendant will be convicted under this instruction for negligence or maladministration. There are no vague terms such as benefit. There is no inherent conflict between the regulations and the instruction.

Defendant's Instruction No. 23 is the instruction recommended in both the 1970 Edition of Devitt and Blackmarr §16.06 and the 1977 Edition of Devitt and Blackmarr §16.05. Cited as authority for the instruction are the following cases:

United States v. Lepowitch, 318 U.S. 702, 704, 63 S.Ct. 914, 916, 87 L.Ed. 1091, reh. denied 319 U.S. 783, 63 S.Ct. 1171, 87 L.Ed. 1727 (1943);

Beck v. United States, 305 F.2d 595 (10th Cir. 1962), cert. denied 371 U.S. 890, 83 S.Ct. 186, 9 L.Ed. 123; *Beaudine v. United States*, 368 F.2d 417, 420 (5th Cir. 1966) appeal after remand 414 F.2d 397; *United States v. Thompson*, 366 F.2d 167, 170-173 (6th Cir. 1966), cert. denied 385 U.S. 973, 87 S.Ct. 412, 17 L.Ed.2d 436; *Releford v. United States*, 352 F.2d 36 (6th Cir. 1965) cert. denied 382 U.S. 984, 86 S.Ct. 562, 15 L.Ed.2d 473 (1966); cf. *Dennis v. United States*, 384 U.S. 855, 859, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966).

Cited with approval *United States v. Industrial Laboratories Co.*, 456 F.2d 908 (10th Cir. 1972).

Moreover compare the instructions given in *Beaudine v. U.S.*, 368 F.2d 417 (5th Cir. 1966) and *United States v. Peden*, 556, F.2d 278 (5th Cir. 1977) and *United States v. Industrial Laboratories Co.*, 456 F.2d 908 (10th Cir. 1972). These instructions are similar to defendant's requested instruction. All of them are much narrower in scope and without the ambiguities inherent in the court's instruction.

Respectfully, should this court not grant this petition for writ of certiorari, the instruction given by the court will set the standard for an instruction on "intent to defraud" to be used in the future in all circuits henceforth on a §1006 violation.

X. The proffered minutes of the Lonoke Production Credit Association were admissible and the trial court should have granted a continuance to Chambers to investigate the circumstances surrounding the minutes. Appendix F.

The decision of the Eighth Circuit Court of Appeals is inconsistent with this court's decisions of *Brady v. State of Maryland*, 373 U.S. 83 (1963), and *Moore v. Illinois*, 408 U.S. 786 (1972).

The minutes of the PCA were in the possession of the Government agents at one time (Vvi, T. 134) (Vvi, T. 137, 139). *U.S. v. Eley*, 335 F. Supp. 353 (N.D.Ga. 1972). This information should have been supplied in advance of trial. *U.S. v. Houston*, 339 F. Supp. 762 (N.D.Ga. 1972)

Moreover, C.K. Cardwell who was present at the meeting where the subject transaction was discussed would hav had the investigation made available to him (Vvi, T. 134). These minutes are a declaration of the governing board of the PCA that there was no criminal activity involved: A shorthand rendition of [the witness'] knowledge of the total situation and the collective facts. *U.S. v. McClintic, Jr.*, (No. 77-1174, 8th Cir. Jan., 13, 1978) authored by Senior District Judge Smith applying Rule 701 of Federal Rules of Evidence, Appendix J; *U.S. v. Freeman*, 514 F.2d 1184 (10th Cir. 1975). They should have been introduced.

At the least, a continuance should have been granted to investigate the circumstances.

CONCLUSION

The Opinion of the Eighth Circuit in this case can best be described as an "abuse of discretion" opinion. Many substantial questions of importance are thus raised by this Petition that were either not discussed or were treated in a limited fashion by the Court of Appeals.

Of utmost importance to the efficient administration of justice in these United States is the belief and faith of the citizenry that every individual will receive a fair and impartial trial and a due process review thereof in accordance with the established law of the land. All of these questions were squarely presented for review. This Petition should be granted.

Respectfully submitted,

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